Supreme Court, U.S.
FILED
APR 11 1994
OFFICE OF THE CLERK

No. 93-1275

In the Supreme Court of the United States

OCTOBER TERM, 1993

CECIL B. JACOBSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the mail fraud, wire fraud, and travel fraud statutes apply to a doctor's scheme to defraud his patients of money.

2. Whether the evidence at trial was sufficient to show that petitioner acted with the intent to defraud his patients.

3. Whether the district court erred in refusing to instruct the jury on the meaning of reasonable doubt.

4. Whether petitioner was denied his constitutional rights to a fair trial, a public trial, and confrontation of his accusers because the district court allowed 11 witnesses who were parents of children fathered by petitioner to use assigned pseudonyms when they testified.

5. Whether the district court improperly departed upwards from petitioner's Sentencing Guidelines range.

6. Whether the district court's reliance on the same relevant conduct in imposing concurrent terms of five years' imprisonment for 35 pre-Guidelines counts and 17 Guidelines counts violated the Double Jeopardy Clause.

7. Whether the court of appeals properly affirmed petitioner's convictions in an unpublished opinion that did not specifically address each of his claims of error.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	22

TABLE OF AUTHORITIES

Cases:

American School of Magnetic Healing v. *McAnnulty*, 187 U.S. 94 (1902)	9, 10
Boyenga v. *United States*, cert. denied, No. 93-6621 (Feb. 28, 1994)	21
Braxton v. *United States*, 111 S. Ct. 1854 (1991)	19
Collins v. *Youngblood*, 497 U.S. 37 (1990)	21
Coy v. *Iowa*, 487 U.S. 1012 (1988)	12
Dunbar v. *United States*, 156 U.S. 185 (1895)	11
Furman v. *United States*, 720 F.2d 263 (2d Cir. 1983)	22
Holland v. *United States*, 348 U.S. 121 (1954)	11
Hopt v. *Utah*, 120 U.S. 430 (1887)	11
Jackson v. *Virginia*, 443 U.S. 307 (1979)	11
Kinder v. *United States*, 112 S. Ct. 2290 (1992)	16
Linder v. *United States*, 268 U.S. 5 (1925)	9
Maryland v. *Craig*, 497 U.S. 836 (1990)	12, 13
Miles v. *United States*, 103 U.S. 304 (1881)	11
NLRB v. *Amalgamated Clothing Workers*, 430 F.2d 966 (5th Cir. 1970)	22
Pereira v. *United States*, 347 U.S. 1 (1954)	7
Press-Enterprise Co. v. *Superior Court of California, Riverside County*, 464 U.S. 501 (1984)	14
Reilly v. *Pinkus*, 338 U.S. 269 (1949)	9, 10
Schmuck v. *United States*, 489 U.S. 705 (1989)	7
Smith v. *Illinois*, 390 U.S. 129 (1968)	13
Solem v. *Helm*, 463 U.S. 277 (1983)	19

Cases—Continued: Page

Taylor v. *McKeithen*, 407 U.S. 191 (1972) 22
Thompson v. *Lynaugh*, 821 F.2d 1054 (5th Cir.), cert. denied, 483 U.S. 1035 (1987) 11
United States v. *August*, 984 F.2d 705 (6th Cir. 1992), cert. denied, 114 S. Ct. 158 (1993) 16
United States v. *Baynes*, 548 F.2d 481 (3d Cir. 1977) ... 22
United States v. *Blackburn*, 992 F.2d 666 (7th Cir.), cert. denied, 114 S. Ct. 393 (1993) 11-12
United States v. *Concepcion*, 983 F.2d 369 (2d Cir. 1992), cert. denied, 114 S. Ct. 163 (1993) 16
United States v. *Emery*, 991 F.2d 907 (1st Cir. 1993) ... 18
United States v. *Ferra*, 900 F.2d 1057 (7th Cir. 1990) .. 18
United States v. *Galloway*, 976 F.2d 414 (8th Cir. 1992), cert. denied, 113 S. Ct. 1420 (1993) 17
United States v. *Glass*, 846 F.2d 386 (7th Cir. 1988) 11
United States v. *Grayson*, 438 U.S. 41 (1978) 15
United States v. Harrison-Philpot, 978 F.2d 1520 (9th Cir. 1992), cert. denied, 113 S. Ct. 2392 (1993) 16
United States v. *Jackson*, 921 F.2d 985 (10th Cir. 1990) 18, 19
United States v. *Kikumura*, 918 F.2d 1084 (3d Cir. 1990) 15, 16, 18, 19
United States v. *Kim*, 896 F.2d 678 (2d Cir. 1990) 18
United States v. *Lam Kwong-Wah*, 966 F.2d 682 (D.C. Cir.), cert. denied, 113 S. Ct. 287 (1992) 16
United States v. *Lara*, 975 F.2d 1120 (5th Cir. 1992) ... 18
United States v. *Lee*, 989 F.2d 180 (5th Cir. 1993) 19
United States v. *Lira-Barraza*, 941 F.2d 745 (9th Cir. 1991) 18
United States v. *MacDonald*, 992 F.2d 967 (9th Cir. 1993) 18
United States v. *Masters*, 978 F.2d 281 (7th Cir. 1992), cert. denied, 113 S. Ct. 2333 (1993) 16-17
United States v. *Melton*, 970 F.2d 1328 (4th Cir. 1992) .. 18

Cases—Continued: Page

United States v. *Mergerson*, 4 F.3d 337 (5th Cir. 1993), cert. denied, No. 93-7246 (Mar. 21, 1994) 16
United States v. *Merritt*, 988 F.2d 1298 (2d Cir.), cert. denied, 113 S. Ct. 2933 (1993) 18-19
United States v. *Moore*, 423 U.S. 122 (1975) 9
United States v. *Moss*, 756 F.2d 329 (4th Cir. 1985) 11
United States v. *Niven*, 952 F.2d 289 (9th Cir. 1991) 19, 20
United States v. *Nolasco*, 926 F.2d 869 (9th Cir.), cert. denied, 112 S. Ct. 111 (1991) 12
United States v. *Olmstead*, 832 F.2d 642 (1st Cir. 1987), cert. denied, 486 U.S. 1009 (1988) 12
United States v. *Pergola*, 930 F.2d 216 (2d Cir. 1991) ... 19
United States v. *Restrepo*, 946 F.2d 654 (9th Cir. 1991), cert. denied, 112 S. Ct. 1564 (1992) 16
United States v. *Russell*, 971 F.2d 1098 (4th Cir. 1992), cert. denied, 113 S. Ct. 1013 (1993) 11
United States v. *Sanchez*, 967 F.2d 1383 (9th Cir. 1992) 17
United States v. *Scarano*, 975 F.2d 580 (9th Cir. 1992) 20
United States v. *Shoupe*, 988 F.2d 440 (3d Cir. 1993) ... 18
United States v. *St. Julian*, 922 F.2d 563 (10th Cir. 1990) 16
United States v. *Tardiff*, 969 F.2d 1283 (1st Cir. 1992) ... 15
United States v. *Taylor*, 997 F.2d 1551 (D.C. Cir. 1993) .. 12
United States v. *Townley*, 929 F.2d 365 (8th Cir. 1991) ... 16
United States v. *Tucker*, 404 U.S. 443 (1972) 15
Victor v. *Nebraska*, No. 92-8894 (Mar. 22, 1994) 11
Waller v. *Georgia*, 467 U.S. 39 (1984) 13, 14
Whiteside v. *Parke*, 705 F.2d 869 (6th Cir.), cert. denied, 464 U.S. 843 (1983) 12
Williams v. *New York*, 337 U.S. 241 (1949) 15
Williams v. *United States*, 112 S. Ct. 1112 (1992) 17, 18, 19
Winship, In re, 397 U.S. 358 (1970) 11

Constitution, statutes and rules: Page

U.S. Const.:
Art. I, § 9, Cl. 3 (Ex Post Facto Clause) 21
Amend. V (Double Jeopardy Clause) 21
Amend. VI 14
Confrontation Clause 12, 13
18 U.S.C. 1341 ..... 2, 9
18 U.S.C. 1343 2
18 U.S.C. 1621 2
18 U.S.C. 1623 2
18 U.S.C. 2314 2
18 U.S.C. 3553(b) 16, 18
18 U.S.C. 3742(f)(2) 17, 18
28 U.S.C. 1291 21
Fed. R. App. P. 36 22
Sentencing Guidelines:
§ 1B1.3 ..... 6, 20, 21
§ 2F1.1 ..... 6, 17, 20
§ 2F1.1(b)(1)(F) 6
§ 4A1.3 18
§ 5K2.0 18
§ 5K2.3 ..... 6, 15, 17
§ 5K2.8 ..... 6, 17
§ 6A1.3 15

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1275

CECIL B. JACOBSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is unreported, but the judgment is noted at 4 F.3d 987 (Table). The opinion of the district court (Pet. App. 16a-24a) is reported at 785 F. Supp. 563.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1993. A petition for rehearing was denied on November 8, 1993. Pet. App. 27a. The petition for a writ of certiorari was filed on February 7, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on 32 counts of mail fraud, in violation of 18 U.S.C. 1341; ten counts of wire fraud, in violation of 18 U.S.C. 1343; four counts of travel fraud, in violation of 18 U.S.C. 2314; one count of perjury, in violation of 18 U.S.C. 1621; and five counts of false declarations, in violation of 18 U.S.C. 1623. He was sentenced to 60 months' imprisonment, to be followed by three years of supervised release, and fined $75,000. Petitioner also was ordered to pay $39,205 in restitution. Pet. App. 4a & n.2.

1. From 1976 to 1988, petitioner, an obstetrician by training, operated Reproductive Genetics, Inc., in Vienna, Virginia. His medical practice consisted primarily of performing amniocentesis on pregnant women and treating other patients for infertility. Although he had no advanced training in infertility medicine, petitioner represented both to his patients and to the public that he was an infertility specialist. Pet. App. 2a; Gov't C.A. Br. 6.

a. Petitioner defrauded numerous infertility patients of money by deceiving them into believing they had become pregnant as a result of his treatment when he knew they were not pregnant. After making false guarantees of success to his patients, petitioner administered regular injections of Human Chorionic Gonadotropin (HCG), a hormone derived from the urine of pregnant women that mimicked the signs of pregnancy. Although HCG has been legitimately used in the treatment of infertility, petitioner's practice was to give his patients repeated injections of large dosages of HCG for up to a year or more. Following the HCG injections, many patients

had delayed menstrual periods, bloating, breast tenderness, nausea, elevated basal body temperatures, and other symptoms associated with pregnancy, and they became convinced that they were pregnant as a result of petitioner's treatment. Petitioner never disclosed to his patients that their symptoms were a natural consequence of the HCG injections, and were not necessarily the result of pregnancy. Petitioner reaped substantial profits from his regular use of HCG and the high volume of patient appointments that his treatment required. Pet. App. 2a-3a; Gov't C.A. Br. 7-9.

After petitioner's patients began to experience the symptoms of pregnancy, petitioner misled them into believing that they were in fact pregnant by using laboratory tests that he knew would test positive for pregnancy due to his HCG treatment. Rather than using blood tests to confirm a patient's pregnancy, petitioner repeatedly administered to his patients qualitative tests that merely revealed the minimum threshold level, rather than the actual level, of HCG in the patient's system in order to create false-positive pregnancy tests. When questioned by his patients, petitioner flatly denied that his HCG treatment could trigger false-positive test results. Since the HCG injections delayed a patient's menstrual period for at most two weeks, petitioner also prescribed progesterone suppositories to patients who began bleeding. When the combination of HCG and progesterone did not prevent menstrual bleeding and cramping for some patients, petitioner performed additional pregnancy tests to reassure the patients that they were pregnant. Pet. App. 3a; Gov't C.A. Br. 9-15.

Petitioner, who was an experienced sonographer, misled many patients into believing that they were pregnant for as many as 20 to 23 weeks by performing weekly sonograms. Although nothing inside a patient's womb

could be mistaken for a fetus during a sonogram, petitioner repeatedly told patients that he saw the arms and legs of their fetuses and that he observed the fetuses sucking their thumbs. Petitioner, who called the fetuses "Junior," also told patients that he was taking measurements of their fetuses and observing their heartbeats. When a patient could not see the fetus on the sonogram screen or ultrasound photograph, petitioner would draw a fetus on the photograph with a magic marker. What petitioner indicated were fetuses often were actually nearby organs or fecal matter. Pet. App. 3a; Gov't C.A. Br. 16-22.

After misleading his patients into believing that their pregnancies were progressing to term, petitioner told his patients that their fetuses had died. When patients asked about the need for a Dilatation and Curettage (D & C) treatment to remove the dead fetus from the uterus, petitioner discouraged the procedure by telling his patients that it could lead to a piercing of the uterus necessitating a hysterectomy. He also told patients that D & C treatments were unnecessary because the dead fetuses would be "resorbed" back into their bodies. Petitioner would then start the patients on a new cycle of HCG injections and pregnancy tests. Pet. App. 4a; Gov't C.A. Br. 22-27.

b. In addition to deceiving patients into believing they were pregnant when they were not, petitioner also ran a donor insemination program in which he fraudulently inseminated and impregnated at least 15 patients with his own sperm. He falsely represented to patients, among other things, that the donor used to inseminate them would never know their identity, would match the physical characteristics of the patient's husband, and would be used to father only two or three other children. As a result, petitioner's patients were induced to pay substan-

tial amounts of money to bear children actually fathered by petitioner. Gov't C.A. Br. 27-31.

c. Petitioner made false statements concerning his infertility treatment in an affidavit filed in response to a civil injunctive action brought by the Federal Trade Commission in 1989. He also made false statements c n-cerning his infertility treatment, his donor insemination program, and his financial affairs in five depositions taken in connection with civil actions filed by his patients. Gov't Opp. to Pet. for Reh'g 5; Presentence Report (PSR) 7-8.

2. Prior to trial, the government sought a protective order to close the courtroom to the public and the press during the testimony of 11 witnesses who were parents of children fathered by petitioner. The district court declined the government's request. Pet. App. 16a-22a. Instead, the court decided to allow the parent witnesses to use assigned pseudonyms when they testified. *Id.* at 22a-23a, 25a-26a. The court found that "[t]he use of pseudonyms is a narrowly tailored measure because it shields the identity of the witnesses from the press and the public only." *Id.* at 23a. The court also concluded that "[u]se of the pseudonyms will not interfere with [petitioner's] preparation for trial, with his ability to cross-examine witnesses at trial, or with the scope of the examination" because "[petitioner] and his counsel will know the true identity of the parents." *Ibid.*

At trial, the 11 parent witnesses called by the government used assigned pseudonyms when they testified, with the pseudonym placed on a placard to remind counsel not to use their true names. In addition, nine of the parent witnesses were allowed slightly to alter their appearance by wearing wigs and makeup. Gov't C.A. Br. 47 n.65. During its jury charge, the court instructed the

jury not to draw any inference of guilt or innocence from the parent witnesses' use of pseudonyms. *Id.* at 49.

3. Because the offenses charged in 35 counts of the indictment were committed before the effective date of the Sentencing Guidelines, petitioner was subject to pre-Guidelines sentences on those counts. The district court sentenced petitioner to concurrent terms of five years' imprisonment on each of those counts. Pet. App. 9a; Gov't C.A. Br. 59.

With respect to the other 17 counts, the presentence report grouped the 11 fraud counts and calculated petitioner's adjusted offense level under Sentencing Guidelines § 2F1.1 on those counts to be 17. That calculation included a five-level adjustment under § 2F1.1(b)(1)(F) for a loss incurred by petitioner's conduct of $85,600. In computing the amount of the loss, the probation officer included as relevant conduct under Guidelines § 1B1.3 the total amount of fees paid by the patients who were named in the indictment or who testified at trial. PSR Worksheet A. After separately determining the adjusted offense levels for the six perjury counts, the presentence report determined that petitioner's combined adjusted offense level was 20. PSR Worksheet B. With a criminal history category of I, petitioner's Guidelines sentencing range was 33-41 months' imprisonment. PSR 19.

Departing upwards, the district court sentenced petitioner to 60 months' imprisonment, to run concurrently with the sentences on the pre-Guidelines counts. Pet. App. 9a-10a. The court justified its upward departure on the grounds that petitioner had inflicted extreme psychological injury on the victims under Guidelines § 5K2.3 (Policy Statement), that the offenses had involved extreme conduct under § 5K2.8 (Policy Statement), and that § 2F1.1 failed to account fully for the harmful conduct. Pet. App. 10a.

4. The court of appeals affirmed. Pet. App. 1a-11a. It rejected petitioner's claim that the use of the mails, wires, and interstate travel was not an integral part of his scheme to defraud his patients. *Id.* at 5a-9a. Relying on *Pereira* v. *United States*, 347 U.S. 1 (1954), and *Schmuck* v. *United States*, 489 U.S. 705 (1989), the court concluded that petitioner's use of the mails "was, without question, a sufficient predicate for the Government's invocation of 18 U.S.C. § 1341" because "[t]he mailings charged by the indictment were incident to essential elements of [petitioner's] fraud: inducing, treating, and billing credulous patients who believed they needed his services." Pet. App. 7a-8a. The court similarly concluded that "[b]ecause the telephone calls cited in the indictment were incident to [petitioner's] ability to schedule patient appointments at which his fraudulent treatments could be administered, * * * they constitute a proper predicate for the wire fraud counts [under 18 U.S.C. 1343]." *Id.* at 8a. The court further found that "the indictment properly charged [petitioner] with inducing his out-of-state patients to travel to Virginia in order to undergo fraudulent medical treatment at his infertility clinic in violation of 18 U.S.C. § 2314." *Id.* at 9a.

The court of appeals also rejected petitioner's claim that the district court improperly departed upwards from the sentencing range on the 17 counts to which the Sentencing Guidelines applied. Pet. App. 9a-11a. The court's "review of the record disclose[d] that the district court's findings of extreme conduct, extreme psychological injury, and the guidelines' inability to capture fully the harm of [petitioner's] behavior are not clearly erroneous." *Id.* at 10a. It also noted that "the three categories of departure invoked by the sentencing court are plainly contemplated as proper bases for departure under the sentencing guidelines." *Id.* at 11a. The court con-

cluded that the district court did not abuse its discretion "by departing upwards from [petitioner's] established guidelines sentencing range to the extent of imposing an additional nineteen months' imprisonment upon him." *Ibid.*

Finally, the court of appeals observed that its "careful review of the record and the arguments of counsel discloses that [petitioner's] remaining assignments of error are wholly without merit, and therefore warrant no discussion on our part." Pet. App. 11a (footnote omitted).

ARGUMENT

1. Petitioner first contends (Pet. 16-21) that his prosecution under the mail fraud, wire fraud, and travel fraud statutes constituted improper federal regulation of his medical practice.

Petitioner is not exempt from prosecution under the federal fraud statutes applied in this case on the theory that he was merely engaging in the professional practice of medicine. The evidence showed that petitioner defrauded patients of money by deceiving them into believing that they were pregnant, that their pregnancies were progressing to term, and that their babies had suddenly died and been resorbed back into their bodies. The evidence further showed that petitioner defrauded patients of money by lying to them about the identity of the donor of the sperm in his donor insemination program. Thus, the evidence showed that petitioner engaged in classic schemes to defraud: he repeatedly deceived, and lied to, his patients about their medical treatment in order to obtain their money.

There is likewise no merit in petitioner's contention that the federal fraud statutes were applied in this case so as to create substantive federal standards of professional medical practice. While there was ample expert

testimony at trial that petitioner's infertility treatments far exceeded the bounds of recognized and acceptable medical practice, the allegations of fraud against petitioner are not predicated on his deviation from the standards of acceptable medical practice. Rather, petitioner's fraud convictions are based on the evidence that he knowingly made false representations to his patients concerning the nature and effect of his treatments.[1] Consequently, petitioner's claim does not warrant further review.

2. Petitioner next contends (Pet. 21-24) that the evidence at trial was insufficient as a matter of law to show that he acted with the requisite criminal intent because there was conflicting expert testimony on the appropriateness of his medical treatment. Petitioner relies (Pet. 23) on two cases involving the predecessor civil counterpart to 18 U.S.C. 1341, see *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94 (1902), and *Reilly* v. *Pinkus*, 338 U.S. 269 (1949), but those cases do not support his contention. In *McAnnulty*, the Court set aside the Postmaster General's fraud order, which was based on a finding that it was false and fraudulent for the American School of Magnetic Healing to claim that a proper mental state could cure physical ills. 187 U.S. at 103-104. Because there were two widely held schools of opinion concerning whether the mind could affect bodily diseases, the Court concluded that scientific knowledge had not advanced to the point where an intent to deceive

---

[1] Neither *Linder* v. *United States*, 268 U.S. 5 (1925), nor *United States* v. *Moore*, 423 U.S. 122 (1975), has anything to do with this case. See Pet. 19. Both involved prosecutions of physicians under the controlled substances statutes and turned on whether those statutes were properly interpreted to cover the specific physician conduct at issue.

could be attributed to a person asserting either opinion. *Id.* at 104. The Court subsequently explained in *Pinkus* that the *McAnnulty* holding did not "prescrib[e] an inexorable rule that automatically bars reliance of the fact-finding tribunal upon informed medical judgment every time medical witnesses can be produced who blindly adhere to a curative technique thoroughly discredited by reliable scientific experiences." 338 U.S. at 274. Rather, the Court in *Pinkus* "accept[ed] the *McAnnulty* decision as a wholesome limitation upon findings of fraud under the mail statutes when the charges concern medical practices in fields where knowledge has not yet been crystallized in the crucible of experience." *Ibid.*

Contrary to petitioner's claim, there was virtually no conflict among the expert witnesses in this case concerning the appropriateness of petitioner's course of treatment for specific patients. Indeed, petitioner's expert witnesses generally agreed with the government's experts that many of petitioner's representations to his patients had been false as a matter of medical fact. The expert witnesses, for example, agreed that, contrary to petitioner's representations to his patients, the sustained administration of HCG injections could cause false-positive pregnancy tests, particularly given the highly sensitive qualitative tests that petitioner used. Gov't C.A. Br. 11-15, 32-36. The experts also generally agreed that, once again contrary to petitioner's representations to his patients, the photographs of the sonograms that petitioner administered to his patients did not show fetuses. *Id.* at 16-22, 32-36. In addition, the experts agreed that there was no evidence that advanced fetuses could resorb back into the mother's body. *Id.* at 24 n.30. Thus, although the expert witnesses may have disagreed over the theoretical validity of petitioner's infertility treatment, they did not differ as to whether

petitioner's representations to his patients during the course of their treatment were false.

3. Petitioner also contends (Pet. 24-25) that the district court erred in failing to define for the jury the concept of "reasonable doubt." That contention does not warrant this Court's review.

Due process requires a trial court to instruct the jury that the government must prove its case beyond a reasonable doubt. See *Jackson* v. *Virginia*, 443 U.S. 307, 320 n.14 (1979); *In re Winship*, 397 U.S. 358 (1970). This Court, however, has never held that the Constitution requires a court to define reasonable doubt for the jury. To the contrary, the Court recently noted in *Victor* v. *Nebraska*, No. 92-8894 (Mar. 22, 1994), slip op. 1, that "the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." See also *Holland* v. *United States*, 348 U.S. 121, 140 (1954); *Dunbar* v. *United States*, 156 U.S. 185, 199 (1895); *Hopt* v. *Utah*, 120 U.S. 430, 440-441 (1887); *Miles* v. *United States*, 103 U.S. 304, 312 (1881).

In light of the difficulties in defining reasonable doubt, three circuits take the view that the trial judge should not define reasonable doubt for the jury, since the definition is likely to add little to the jury's understanding of the concept and may in some instances lead to jury confusion. See *United States* v. *Glass*, 846 F.2d 386, 387 (7th Cir. 1988); *United States* v. *Moss*, 756 F.2d 329, 333 (4th Cir. 1985); *Thompson* v. *Lynaugh*, 821 F.2d 1054, 1060-1061 (5th Cir.), cert. denied, 483 U.S. 1035 (1987).[2] Four

---

[2] The Fourth and Seventh Circuits disagree as to whether reasonable doubt should be defined if the jury asks the court to do so. Compare *United States* v. *Russell*, 971 F.2d 1098, 1108 (4th Cir. 1992) (court should define if jury is "demonstrably confused or uncertain"), cert. denied, 113 S. Ct. 1013 (1993) with *United States* v.

other circuits have held that it is not error for a district court to refrain from defining reasonable doubt. *United States* v. *Taylor*, 997 F.2d 1551, 1557-1558 (D.C. Cir. 1993); *United States* v. *Nolasco*, 926 F.2d 869, 872 (9th Cir.) (en banc), cert. denied, 112 S. Ct. 111 (1991); *United States* v. *Olmstead*, 832 F.2d 642, 646 (1st Cir. 1987), cert. denied, 486 U.S. 1009 (1988); *Whiteside* v. *Parke*, 705 F.2d 869, 871-873 (6th Cir.), cert. denied, 464 U.S. 843 (1983). Since the district court's refusal in this case to instruct on the meaning of reasonable doubt is consistent with the clear trend of recent authority in the federal courts, and does not conflict with any decision of any other court of appeals, petitioner's claim merits no further review.

4. Petitioner next contends (Pet. 25-27) that he was denied his constitutional rights to a fair trial, a public trial, and confrontation of his accusers when the district court allowed the 11 witnesses who were parents of children fathered by petitioner to use assigned pseudonyms when they testified. Petitioner's principal claim (Pet. 25-26) is that the procedure of allowing the 11 parent witnesses to testify using pseudonyms violated the Confrontation Clause by depriving him of a "face-to-face meeting" with his accusers. See *Maryland* v. *Craig*, 497 U.S. 836, 844 (1990) ("the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact") (quoting *Coy* v. *Iowa*, 487 U.S. 1012, 1016 (1988)). In *Craig*, the Court explained that "[t]he combined effect of [the] elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact—serves the purposes of the Confrontation

---

Blackburn, 992 F.2d 666, 668 (7th Cir.) (court should refuse requests for definition), cert. denied, 114 S. Ct. 393 (1993). That issue is not presented in this case.

Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." 497 U.S. at 846. The Court concluded in *Craig* that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id.* at 850.

In this case, petitioner obviously was not deprived of a "physical, face-to-face confrontation" with the 11 parent witnesses who used assigned pseudonyms. Rather, petitioner confronted those witnesses face-to-face when they testified in open court.[3] Moreover, each of the witnesses testified under oath and was fully cross-examined by petitioner, and the jury was able to observe each witness's demeanor. Thus, there is plainly no merit in petitioner's claim that he was deprived of his Confrontation Clause rights at trial.

Nor is there any merit in petitioner's claim that he was deprived of a public trial. In *Waller* v. *Georgia*, 467 U.S. 39, 45 (1984), the Court made clear that "the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting dis-

---

[3] Petitioner suggests (Pet. 25) that he was deprived of a physical, face-to-face confrontation because the witnesses were allowed "to appear in disguise and under obviously fictitious names." The district court, however, merely allowed the witnesses slightly to alter their appearances by wearing wigs and makeup. Gov't C.A. Br. 47 n.65. Moreover, petitioner was advised of the true identity of each witness long before trial in accordance with the terms of the protective order. Pet. App. 23a, 25a-26a. Cf. *Smith* v. *Illinois*, 390 U.S. 129 (1968).

closure of sensitive information." The Court explained that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Ibid.* (quoting *Press-Enterprise Co.* v. *Superior Court of California, Riverside County*, 464 U.S. 501, 510 (1984)). In this case, the district court refused the government's request to close the trial to the public during the testimony of the 11 parent witnesses. Rather, the district court selected the less drastic measure of using pseudonyms for the witnesses. Pet. App. 20a-23a. Although the use of pseudonyms deprived the public of knowledge of the identity of the witnesses, that limitation was justified by a compelling interest in protecting the well-being of children. Based on affidavits from a psychologist and a child psychiatrist, the district court found that "[i]n order to safeguard the psychological well-being of [the] children, information regarding their paternity should be revealed to them in a careful manner controlled and directed by their parents." *Id.* at 21a. The district court thus concluded that "keeping secret the true identity of the parents and their children is necessitated by the compelling and overriding governmental interest in the psychological health and welfare of the children involved in this matter." *Ibid.* Accordingly, petitioner's claim that he was deprived of his Sixth Amendment right to a public trial warrants no further review.[4]

---

[4] There is likewise no merit in petitioner's claim (Pet. 26) that the use of pseudonyms for the 11 parent witnesses, along with identifying placards, deprived him of a fair trial by suggesting that the children's biological relationship with petitioner was "stigmatizing." The placards were simply used to remind counsel not to use the witnesses' real names, and petitioner did not object to that procedure at trial. Gov't C.A. Br. 47 n.65. In any event,

5. Petitioner also contends (Pet. 27-28) that the district court improperly departed upwards from his Sentencing Guidelines range because his victims had suffered "extreme psychological injury" under Guidelines § 5K2.3 (Policy Statement) based on unverified hearsay statements from the victims. He further contends (Pet. 28-29) that the district court improperly failed to structure the extent of the upward departure by analogy to other provisions of the Sentencing Guidelines. Neither contention warrants this Court's review.

a. There is no merit in petitioner's claim (Pet. 27-28) that the district court improperly relied on letters from petitioner's former patients in finding that his victims had suffered "extreme psychological injury" under Guidelines § 5K2.3. In *United States* v. *Tucker*, 404 U.S. 443, 446 (1972), this Court explained that a sentencing judge may "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." See also *United States* v. *Grayson*, 438 U.S. 41, 49-50 (1978); *Williams* v. *New York*, 337 U.S. 241, 250-251 (1949). That principle is embraced in the Sentencing Guidelines, which allow a district court to consider any reliable evidence, including hearsay, at sentencing. See Guidelines § 6A1.3 (Policy Statement); see also *United States* v. *Tardiff*, 969 F.2d 1283, 1287 (1st Cir. 1992) (victim impact statements are "the type and kind of evidence on which sentencing courts have commonly relied").

Relying on *United States* v. *Kikumura*, 918 F.2d 1084 (3d Cir. 1990), petitioner claims (Pet. 27-28) that the evidence of psychological injury was insufficient to

---

the district court specifically instructed the jury against drawing inferences of guilt or innocence from the witnesses' use of pseudonyms. Gov't C.A. Br. 49.

justify an upward departure from the Guidelines sentencing range, because the departure must be established by clear and convincing evidence. The courts of appeals have generally held, however, that factual findings under the Sentencing Guidelines need not be established by more than a preponderance of the evidence. See, *e.g.*, *United States* v. *Lam Kwong-Wah*, 966 F.2d 682, 685-686 (D.C. Cir.) (collecting cases), cert. denied, 113 S. Ct. 287 (1992); *United States* v. *Restrepo*, 946 F.2d 654, 655-656 (9th Cir. 1991) (en banc) (same), cert. denied, 112 S. Ct. 1564 (1992). Although the court of appeals in *Kikumura* required proof by clear and convincing evidence to support the district court's 22-level upward departure in the defendant's offense level under 18 U.S.C. 3553(b), see 918 F.2d at 1100-1102, the departure in that case resulted in an increase in the defendant's sentence from 30 months' imprisonment to 30 years' imprisonment. *Id.* at 1100. Some courts of appeals have left open the question whether a higher standard of proof may be appropriate in such exceptional cases. See *United States* v. *Mergerson*, 4 F.3d 337, 343-344 (5th Cir. 1993), cert. denied, No. 93-7246 (Mar. 21, 1994); *United States* v. *Concepcion*, 983 F.2d 369, 390 (2d Cir. 1992), cert. denied, 114 S. Ct. 163 (1993); *United States* v. *Lam Kwong-Wah*, 966 F.2d at 687-688; *United States* v. *Restrepo*, 946 F.2d at 661 & n.12; *United States* v. *Townley*, 929 F.2d 365, 369-370 (8th Cir. 1991); *United States* v. *St. Julian*, 922 F.2d 563, 569 n.1 (10th Cir. 1990); see also *Kinder* v. *United States*, 112 S. Ct. 2290, 2291-2292 (1992) (White, J., dissenting from denial of certiorari). We are unaware, however, of any court of appeals that has followed *Kikumura*. See *United States* v. *August*, 984 F.2d 705, 713-714 (6th Cir. 1992) (per curiam), cert. denied, 114 S. Ct. 158 (1993); *United States* v. *Harrison-Philpot*, 978 F.2d 1520, 1524 & n.1 (9th Cir.

1992), cert. denied, 113 S. Ct. 2392 (1993); *United States* v. *Masters*, 978 F.2d 281, 286-287 (7th Cir. 1992), cert. denied, 113 S. Ct. 2333 (1993); *United States* v. *Sanchez*, 967 F.2d 1383, 1386-1387 (9th Cir. 1992). Thus, it is highly unlikely that any court of appeals would find that the district court's 19-month upward departure from the top of petitioner's sentencing range was sufficiently extraordinary to warrant application of a higher standard of proof. See, *e.g.*, *United States* v. *Galloway*, 976 F.2d 414, 425 (8th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1420 (1993).

In any event, as the court of appeals noted, the district court's upward departure in this case was based not only on the letters from petitioner's former patients but also on the testimony of petitioner's victims at trial. Pet. App. 10a. Moreover, the district court based its upward departure not only on the ground that petitioner had inflicted extreme psychological injury on the victims under Guidelines § 5K2.3 but also on two other grounds: that the offenses involved extreme conduct under § 5K2.8 (Policy Statement) and that the fraud guideline, § 2F1.1, failed to account fully for the harmful conduct. Pet. App. 10a. The district court did not err in concluding that a 19-month upward departure was "reasonable" based on these three grounds.

b. There is likewise no merit in petitioner's claim (Pet. 28-29) that the district court improperly failed to structure the extent of the upward departure by analogy to other provisions in the Sentencing Guidelines. As this Court noted in *Williams* v. *United States*, 112 S. Ct. 1112, 1120 (1992), the extent of a district court's departure from the Guidelines range is reviewed for reasonableness under 18 U.S.C. 3742(f)(2). In assessing reasonableness, the Court explained, "a court of appeals [should] examine the factors to be considered in imposing

a sentence under the Guidelines, as well as the district court's stated reasons for the imposition of the particular sentence." 112 S. Ct. at 1121.

Although the Sentencing Guidelines recommend a procedure for departures from the Guidelines sentencing range based on a defendant's criminal history, see Guidelines § 4A1.3 (Policy Statement), they do not recommend any specific procedure for departures under 18 U.S.C. 3553(b) and Guidelines § 5K2.0 (Policy Statement) based on aggravating or mitigating circumstances. See, *e.g.*, *United States* v. *Shoupe*, 988 F.2d 440, 445 n.7 (3d Cir. 1993). In order to determine whether a departure is reasonable under 18 U.S.C. 3742(f)(2), a number of courts of appeals have recommended that district courts structure upward departures—both as to the aggravating circumstances relied upon and the degree of departure—by analogy to other specific offense characteristics that the Guidelines take into account. See, *e.g.*, *United States* v. *Lara*, 975 F.2d 1120, 1126 (5th Cir. 1992); *United States* v. *Melton*, 970 F.2d 1328, 1334 (4th Cir. 1992); *United States* v. *Lira-Barraza*, 941 F.2d 745, 747-751 (9th Cir. 1991) (en banc); *United States* v. *Jackson*, 921 F.2d 985, 990-991 (10th Cir. 1990) (en banc); *United States* v. *Kikumura*, 918 F.2d at 1112-1113; *United States* v. *Ferra*, 900 F.2d 1057, 1062-1063 (7th Cir. 1990); *United States* v. *Kim*, 896 F.2d 678, 683-685 (2d Cir. 1990). The First Circuit appears to be the only court of appeals that has explicitly rejected that approach. See *United States* v. *Emery*, 991 F.2d 907, 913 n.10 (1993). At the same time, most of the courts of appeals have also indicated that district courts need not mechanically justify their departures by analogy in every case so long as the court explains on the record how it determined the magnitude of the departure. See, *e.g.*, *United States* v. *MacDonald*, 992 F.2d 967, 971 (9th

Cir. 1993); *United States* v. *Merritt*, 988 F.2d 1298, 1311 (2d Cir.), cert. denied, 113 S. Ct. 2933 (1993); *United States* v. *Jackson*, 921 F.2d at 991; *United States* v. *Kikumura*, 918 F.2d at 1113; see also *United States* v. *Lee*, 989 F.2d 180, 183-184 (5th Cir. 1993) (per curiam).

To the extent that there is some disagreement among the courts of appeals over whether a district court is required to justify an upward departure based on a defendant's offense-related conduct by analogy to other guidelines, the Commission is available to clarify matters. See *Braxton* v. *United States*, 111 S. Ct. 1854, 1858 (1991). In any event, this case does not present a suitable vehicle to address that issue. Here, the district court's upward departure was based primarily on the effect of petitioner's crimes on the victims. Pet. App. 10a. As the Second Circuit explained in *United States* v. *Pergola*, 930 F.2d 216, 220 (1991), "the requirement of a specific step-by-step calculation and comparison [to other guidelines] is not particularly apt where * * * (a) harm to the victim is at issue, and (b) the type of harm at issue is psychological rather than physical, making observation difficult and quantification nearly impossible." Moreover, this Court noted in *Williams* v. *United States*, *supra*, that "[t]he development of the guideline sentencing regime has not changed our view that, except to the extent specifically directed by statute, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'" 112 S. Ct. at 1121 (quoting *Solem* v. *Helm*, 463 U.S. 277, 290 n.16 (1983)). Accordingly, further review of petitioner's claim is not warranted.

6. Petitioner also contends (Pet. 29) that the court of appeals' decision affirming the district court's sentence conflicts with *United States* v. *Niven*, 952 F.2d 289 (9th

Cir. 1991) (per curiam). That contention is without merit.

In *Niven*, the district court included losses involved in pre-Guidelines fraud counts as relevant conduct under Guidelines § 1B1.3 in its calculation of the total loss under § 2F1.1 for purposes of determining the defendant's sentencing range on fraud counts to which the Sentencing Guidelines applied. The district court then sentenced the defendant in *Niven* to five years' imprisonment on the pre-Guidelines counts, to run consecutively to a 51-month sentence on the Guidelines counts. 952 F.2d at 293. The Ninth Circuit concluded that the "[i]nclusion of the pre-Guidelines portion of the total loss when determining both the pre-Guidelines and Guidelines sentences potentially violates the Double Jeopardy Clause, which 'protects against multiple punishments for the same offense.'" *Id.* at 293-294 (citation omitted). It therefore remanded for resentencing with directions to the district court "to calculate the Guidelines sentence solely with reference to losses not considered in imposing the pre-Guidelines sentence." *Id.* at 294. The Ninth Circuit further explained: "Alternatively, the [district] court may aggregate the amount of losses in calculating the offense level for the Guidelines sentence, so long as it imposes *concurrent* sentences for the pre-Guidelines and Guidelines offenses." *Ibid.* (emphasis added). See also *United States* v. *Scarano*, 975 F.2d 580, 586 (9th Cir. 1992).

Like the district court in *Niven*, the district court in this case included the losses involved in the pre-Guidelines fraud counts as relevant conduct under Guidelines § 1B1.3 in its calculation of the total loss under § 2F1.1 for purposes of determining petitioner's sentencing range on the fraud counts to which the Sentencing Guidelines applied. Unlike the district court

in *Niven*, however, the district court in this case imposed concurrent sentences on the pre-Guidelines counts and the Guidelines counts. Accordingly, the district court's sentence is fully consistent with the Ninth Circuit's decision in *Niven*.[5]

7. Finally, petitioner criticizes (Pet. 30) the court of appeals for issuing an unpublished opinion that fails to address most of the "main" points he raised on appeal. That criticism supplies no basis for reviewing, much less reversing, the judgment below. The right to appeal provided a defendant under 28 U.S.C. 1291 entitles him to an independent review of the district court's judgment by the court of appeals. Petitioner received precisely that. The right to an appeal does not also encompass the right

---

[5] Notwithstanding *Niven*, petitioner suggests (Pet. 29) that inclusion of the pre-Guidelines portion of the total loss in the calculation of the sentence for the Guidelines counts violates the Double Jeopardy Clause, even if concurrent sentences are imposed. That issue, however, is of no continuing importance, as it arises only in a rapidly diminishing number of cases involving simultaneous fraud prosecutions for criminal conduct that both precedes and follows the November 1, 1987, effective date of the Sentencing Guidelines. This Court recently declined to consider a challenge under the Double Jeopardy Clause to the use of the same type of pre-Guidelines conduct in imposing both a Guidelines and a pre-Guidelines sentence, see *Boyenga* v. *United States*, cert. denied, No. 93-6621 (Feb. 28, 1994), and there is no reason for a different disposition in this case.

There is likewise no merit in petitioner's passing suggestion (Pet. 29) that his sentence violated the Ex Post Facto Clause. The application of Guidelines § 1B1.3 to include the pre-Guidelines portion of the total loss in the determination of the Guidelines sentencing range affects petitioner's sentence only on the Guidelines counts; it does not retrospectively increase the punishment for any offense after that offense is committed. See *Collins* v. *Youngblood*, 497 U.S. 37 (1990).

to an opinion treating each of the defendant's claims separately and in detail. "The fact that a disposition is by informal summary order rather than by formal published opinion in no way indicates that less than adequate consideration has been given to the claims raised in the appeal." *Furman* v. *United States*, 720 F.2d 263, 265 (2d Cir. 1983) (per curiam). See also *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972) (per curiam) (courts of appeals "have wide latitude in their decisions of whether or how to write opinions"); *United States* v. *Baynes*, 548 F.2d 481 (3d Cir. 1977) (per curiam); *N L R B* v. *Amalgamated Clothing Workers*, 430 F.2d 966, 971 (5th Cir. 1970); Fed. R. App. P. 36.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

APRIL 1994